FILE COPY

Office-Supreme Court, U. S.
FILED
DEC 14 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 362

NICK MASICH, *Appellant*,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and F. S. MULOCK, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF UTAH

RESPONSE TO PETITION FOR REHEARING.

C. W. WILKINS,
PAUL H. RAY,
CHARLES A. HORSKY,
Attorneys for Appellees.

CHENEY, MARR, WILKINS & CANNON,
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
Of Counsel.

POOR COPY

BLEED THROUGH

SUBJECT INDEX.

	Page
Response to petition for rehearing	1
Proceedings to date	1
New matter contained in the petition for rehearing	2
Argument	3
(1) The certificate is insufficient to show that a federal question was properly presented and decided	3
(2) The certificate is insufficient to show that resolution of the federal questions was necessary to the decision	9
(3) The federal questions are not substantial	10
(4) The petition should be denied in the exercise of this Court's discretionary power over rehearings	14
Conclusion	15

BLEED THROUGH POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 362

NICK MASICH, *Appellant*,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and F. S. MULOCK, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF UTAH

RESPONSE TO PETITION FOR REHEARING.

As permitted by Rule 33(1)(a) the appellees submit this response to the appellant's petition for rehearing.

Proceedings to Date.

On March 25, 1948, the Supreme Court of Utah affirmed a declaratory judgment construing Utah's Occupational Disease Disability Law[1] to bar an employee from recover-

[1] Utah Code Ann., tit. 42, c. 1a (1943), as amended, 1945 Laws of Utah, c. 66. The particular section at issue was § 42-1a-3.

ing damages or compensation for partial disability resulting from silicosis incurred through his employer's negligence.[2] The record gives no hint that any federal question was either raised or decided up to this point.

On May 6, appellant filed a petition for rehearing in which he did raise certain federal questions. The brief in support of that petition concluded as follows:

> "In order to accomplish that purpose [a review by this Court] it is necessary that this court [the Supreme Court of Utah] first decide such questions and in order to avoid the necessity of again presenting such question in another proceeding we most earnestly and respectfully urge this court to re-examine the matter of whether or not the Act as heretofore construed by this court offends against the constitutional provisions mentioned to the end that a final decision may be secured touching the constitutionality of the Act."

Although appellant's problem was thus explicitly called to its attention, the Supreme Court of Utah on June 29 denied the petition without opinion.

On September 17 Chief Justice McDonough allowed an appeal, and on September 29 appellees served their motion to dismiss. On November 15 this Court granted the motion and dismissed the appeal "for want of a properly presented Federal question."

On November 26 appellant filed the present petition for a rehearing. Upon seasonable application Mr. Justice Rutledge allowed appellees an extension of time to December 14 within which to file this response.

New Matter Contained in the Petition for Rehearing.

The petition is based upon a certificate from Chief Justice McDonough and an affidavit by one of appellant's attorneys. The certificate says that the Utah Supreme Court

[2] Appellees denied negligence, but the case was tried in such a way as to reserve that issue for later determination if the statute should be construed in appellant's favor.

POOR COPY

BLEED THROUGH

considered and passed upon the question of whether the Utah statute, as applied in this case, was repugnant to the due process clause of the Fourteenth Amendment, Art. IV § 2, and the Fifth Amendment of the federal constitution. The affidavit recounts private conversations the affiant attorney had with the chief justice and another justice of the Utah Supreme Court.

Appellant's duty, of course, is to show affirmatively from the record that a substantial federal question was seasonably presented, that it was actually decided, and that its decision was necessary to affirmance of the judgment. It should go without saying that the affidavit does not form part of the record and for jurisdictional purposes is not properly before this Court.

Argument.

There are four separate and independent reasons, we believe, why the petition for rehearing should be denied: (1) For purposes of establishing this Court's jurisdiction the certificate is insufficient to show that a federal question was properly presented and decided. (2) If the certificate should be considered sufficient to show that fact, it is nonetheless insufficient to show that resolution of any federal question was necessary to the decision. (3) Even if decision of a federal question was necessary to disposition of the case, the question is not substantial. (4) In any event, the facts of this case make it appropriate for the Court to withhold exercise of its discretionary power to grant a rehearing.

(1) The certificate is insufficient to show that a federal question was properly presented and decided.

The authorities do not make entirely clear the effect which the Court will give to certificates in any particular case.

The latest general compilation of cases appears in the first footnote to *Charleston Federal Savings & Loan Ass'n*

v. *Alderson*, 324 U. S. 182, 186 (1945). The footnote says that "generally" the certificate of the highest state court, as such, will be sufficient to establish jurisdiction "when it is consistent with the record," but that the certificate of the court's chief justice will not be. The holding of the case, however, was only that a certificate of the presiding justice of the West Virginia Supreme Court, absent confirmatory evidence in the record, would not sustain jurisdiction.

The most recent full discussion of the function of a certificate of the highest state court itself is contained in *Honeyman* v. *Hanan*, 300 U. S. 14 (1937). Speaking for a unanimous Court, Mr. Chief Justice Hughes there reviewed the authorities and concluded:

> "A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present." *Id.* at 18-19.

Later in the opinion he said:

> "Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the federal question was properly raised and was necessarily determined. Our decisions in cases where certificates have been found useful should be read in the light of that fundamental consideration." *Id.* at 22.

A footnote was devoted to the "insufficiency of a certificate by the chief justice or presiding justice of the state court." *Id.* at 18 n. 1.

POOR COPY

BLEED THROUGH

Thus it seems that neither the certificate of the highest state court nor that of its chief justice will be considered sufficient in itself to sustain this Court's jurisdiction of an appeal. Both will be given consideration in explaining ambiguities in the record, and the certificate of the court will be accorded greater weight in this regard than that of the chief justice. But in neither case will the certificate be permitted to "import into the record a federal question which otherwise the record wholly fails to present." This underlying reluctance to give effect to certificates presumably does not result from doubt as to their accuracy. Instead it reflects the Court's persistent effort to construe strictly its statutory jurisdicion and to avoid unnecessary decision of constitutional issues—especially those affecting the delicate balance between state and federal power.[3]

In view of the authorities, our first question, then, is whether the present certificate should be treated as the certificate of the Utah Supreme Court or simply that of the chief justice. Here an ambiguity arises. The certificate is certainly not expressly that of the entire court, nor is it signed by all members of the court.[4] The words "By the Court" might be construed to make it the certificate of the chief justice as agent of the court. On the other hand, it is captioned "Certificate of the Chief Justice" although that fact does not appear from the printed petition; it begins "I, Rodger I. McDonough, Chief Justice of the Supreme Court of the State of Utah, hereby certify;" and it contains no recital that it was executed at the direction of the court or with specific approval of all members or even a majority of the court.[5]

---

[3] Cf. the dissent in Indiana ex rel Anderson v. Brand, 303 U. S. 95, 110-1 (1938), a case in which a certificate signed by all members of the state court was held sufficient to explain an ambiguous statement in the opinion.

[4] See Indiana ex rel. Anderson v. Brand, supra note 3.

[5] See Consolidated Turnpike Co. v. Norfolk and Ocean View Ry., 228 U. S. 596, 598 (1913).

A second question which must be answered before the effect of the certificate can be appraised in this case is whether it applies to the original hearing by the Supreme Court of Utah or to the denial of a rehearing. Here the doubt is even more pronounced. The certificate says only that the three federal constitutional questions were considered and passed upon in "the above entitled cause." At what stage this was done is not stated. The natural assumption would be that it was on denial of rehearing. Yet there are factors opposed to such a construction. The concluding paragraph of the petition put the Utah Supreme Court on notice that appellant could not obtain a review here unless that court entertained the petition and expressly passed upon the federal questions. If the Utah Supreme Court had decided those questions for the first time on rehearing and was disposed to frame the record to give appellant undoubted standing to appeal, it would seem logical for it to have heeded his request for an opinion. From the denial without opinion, followed by the certificate over four months later, it might be inferred that the court was and is under the impression that the federal questions were so similar to the state constitutional issue it expressly decided on the original hearing that they could be deemed to have been resolved *sub silentio* at that time. Additional support for this construction lies in the Utah Supreme Court's frequently expressed rule that it will not consider on rehearing points not brought to its attention in the normal way before the original hearing.[6]

We will assume *arguendo* that the certificate is that of the Utah Supreme Court rather than of the chief justice himself. If on that assumption it is insufficient, *a fortiori* it would be insufficient if taken as the certificate of the chief justice personally. In either case, as mentioned above, the

---

[6] See Pingree National Bank v. Weber County, 54 U. 599, 183 Pac. 334; Western Securities Co. v. Silver King Consolidated Mining Co., 57 U. 88, 192 Pac. 664; In re Lowe's Estate 68 U. 49, 249 Pac. 128; Dalquist v. Denver & R. G. RR., 52 U. 438, 469, 174 Pac. 833, 843.

BLEED THROUGH POOR COPY

basic issue is whether the record contains other evidence that the federal questions were actually decided.

Taking the certificate first as applying to the original hearing, the record, as shown in our motion to dismiss, reveals a complete want of anything else to suggest decision of any federal question. In terms of the language quoted above from *Honeyman* v. *Hanan* this certificate would not merely "aid in the understanding of the record," it would not "clarify" the record, and it would not show "how the question was raised." On the contrary, it would "import into the record a Federal question which otherwise the record wholly fails to present." As a practical matter it is probably true that the Utah Supreme Court would uphold the statute against a claimed repugnancy to the federal constitution by reasoning similar to that by which it sustained the act against the "due course of law" clause of the Utah Constitution.[7] But that is not enough to establish this Court's jurisdiction. To do that there must have been a decision of the federal questions *qua* federal questions.[8]

Reading the certificate as applying to the denial of a rehearing, the same result follows. The federal questions were posed, together with questions of state law, in the petition. But, as mentioned above, nothing in the Utah precedents would indicate that they were decided when the rehearing was denied without opinion. In this regard, of course, Utah merely follows the practice usual throughout the country, a practice recognized in this Court's well-established rule that a federal question raised for the first time in a petition for rehearing in the highest state court is, in general, not seasonably raised for jurisdictional purposes. In the language of *Fullerton* v. *Texas,* 196 U. S. 192, 194 (1905),

> "... on the face of the record proper and from the opinions, the reasonable inference is that the court

[7] Utah Const. Art. I, § 11. See 191 P. 2d. 612, 624-5.

[8] 28 U. S. C. § 1257; cf. Bowe v. Scott, 233 U. S. 658, 664-5 (1914).

> may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late. . . ."[9]

These considerations suggest that the Supreme Court of Utah, if it decided the federal questions on rehearing, may well have done so without experiencing the compulsion to ponder them with the precision and deliberation it would have if an opinion had been required or if the questions had been raised before the original hearing.

The only case we have found in which a certificate was squarely held sufficient to show that the denial of a rehearing was based on decision of a federal question is *Lisenba* v. *California*, 314 U. S. 219 (1914). The special circumstances of that case may well put it in a class apart. Lisenba had been convicted of murder and was under sentence of death. Not until his second petition for rehearing before the California Supreme Court did he raise federal questions. That petition was denied without opinion November 3, 1939. On November 8 the Chief Justice of California executed a certificate in which he enumerated the constitutional questions presented by the second petition for rehearing; stated that the court entertained the petition, and explicitly overruled each of the contentions made therein; certified that the decision denying rehearing "is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States . . . were violated"; and concluded: "It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States." The State's brief in the case did not contest jurisdiction, and the Court commented only that "On the record so made, this court has jurisdiction . . .", citing

[9] The **Fullerton** case involved a certificate of the presiding judge executed "some weeks" after a rehearing was denied. The quoted remarks, however, are applicable whatever nature the certificate takes on.

POOR COPY

BLEED THROUGH

four cases not involving rehearings. The certificate, it will be noted, is much more detailed than that in the present case. It was also executed almost contemporaneously with the order it explained. More important, the very fact that it related to a capital case was a persuasive independent indication that the California court did indeed entertain the petition and decide with utmost deliberation the federal questions it presented.[10]

In short, we do not believe that the certificate cures the jurisdictional defect noted in this Court's *per curiam* order of November 15, 1948. It is ambiguous as to the authority behind it, and this in the face of the consistent differentiation this Court has made between various types of certificate. It is ambiguous as to the stage of the proceedings at which the federal questions were raised and decided, and this in the face of the Court's repeated emphasis on the jurisdictional importance of such information.[11] And it is not supported by other material appearing in the record. The appellant, we believe, has still fallen short of shouldering the burden of affirmatively demonstrating that the Court has jurisdiction over this appeal.

(2) The certificate is insufficient to show that resolution of the federal questions was necessary to the decision.

The certificate states that three federal questions were passed upon. Nothing in the certificate, however, negates the possibility that there were alternative bases on which the decision may have rested. Whether the certificate applies to the original hearing or the rehearing, it would not be unusual if the Utah Supreme Court had considered its action equally justified by its discretionary power to

[10] Behind the Court's decision to apply its jurisdictional rules somewhat less strictly than usual there may have been another consideration: exercise of jurisdiction resulted in review of the propriety of a single conviction, not of the validity of a statute of broad application which had the imprimatur of all three branches of the state government.

[11] See, e. g., Rule 12, para. 1; Rule 38, para. 2.

refuse to reverse on the strength of points not raised at the first opportunity. If that was the case, the decision below would rest on an adequate, independent state ground.

(3) The federal questions are not substantial.

The certificate indicates that the Utah statute in question was attacked under three different clauses of the Federal Constitution: "Article Four Section Two", the "Fifth Amendment" and the due process clause of the Fourteenth Amendment.

We assume that the reference to "Article Four Section Two" is to the privileges and immunities clause of that section. Since, however, appellant states in his complaint that he is a resident of Utah and indicates that he has met all the residence requirements of the statute, he is in no position to rely upon a clause designed to protect citizens of other states against discrimination by Utah. See *Toomer* v. *Witsell*, 334 U. S. 385, 395-6 (1948).

Similarly we suppose that it is the due process clause of the Fifth Amendment upon which appellant relies. That clause, however, operates as a restriction on the federal government, not on the states.

The challenge based on the due process clause of the Fourteenth Amendment is the only one with any color. Appellant's contention is that the Utah Occupational Disease Disability Law offends the clause in that it deprives an employee who is not totally disabled of his common law right to sue his employer for damages. The mere fact that the Law abolishes common law rights does not mean that it violates the due process clause. See *Silver* v. *Silver*, 280 U. S. 117, 122 (1930). The question is whether the Law, viewed in its entirety, is so unreasonable, arbitrary and capricious that its passage transcended the power of the State of Utah. See *Nebbia* v. *New York*, 291 U. S. 502 (1934); *N. Y. Central RR.* v. *White*, 243 U. S. 188 (1917). Consideration of that question requires examination of

BLEED THROUGH POOR COPY

the background of the statute and analysis of exactly what it does.

In 1937 the first bill covering compensation for disability resulting from occupational diseases was introduced in the Utah legislature. The bill was defeated by a narrow margin, as was a similar bill early in 1939. As a result, however, the 1939 legislature passed an act which directed the State Board of Health to make a systematic survey, in collaboration with the United States Public Health Service, to determine the nature and extent of the occupational disease problem in Utah. The same statute directed the Utah Industrial Commission, which had long administered the state's Workmen's Compensation Law, to select a committee from management and labor to draft an occupational disease bill.[12] The survey was made and a report submitted in the fall of 1940. The drafting committee, consisting of three representatives from management, three from labor and an ex officio chairman, was appointed and early in 1941 reported to the legislature a bill which the committee members unanimously agreed upon and which they considered "fair both to industry and to labor." They urged its passage without amendment.[13] The bill passed both houses of the 1941 legislature without a dissenting vote.[14] That is the statute appellant is now attacking.

In broad outline, the statute requires an employer to pay compensation at a set rate to an employee or his dependents if the employee has suffered death or total disablement (temporary or permanent) from any one of specified occupational diseases incurred in the course of his employ-

---

[12] Utah Laws of 1939, c. 131. By § 4, a special fund of $25,000 was appropriated for the state's contribution to the expenses of the state-federal survey.

[13] Utah House Journal 86-7 (1941).

[14] Id. at 264-5; Utah Senate Journal 330 (1941). Other references to the bill appear in House Journal 92, 163, 203, 252, 293, 461, 462, 634 and 795 and in Senate Journal 310, 322, 586, and 587.

ment.[15] Silicosis is one of the diseases listed, and because of its nature various general provisions of the Law, such as that covering the limitations period, are made more liberal than in the case of other diseases.[16] In addition, and again unlike other diseases, silicosis complicated by active pulmonary tuberculosis is presumed to effect total disablement.[17] In the event of total disablement the employee is thus sure of recovering the statutory compensation and of doing so expeditiously and without further expense. He need not hire lawyers, he need not prove negligence on the part of the employer, and he need not overcome the traditional common law defenses of contributory negligence, assumption of risk, and negligence of a fellow-employee. For disability falling short of the statutory definition of total disablement, on the other hand, the employee has no legal recourse.

It is not without significance that at least ten other states and England have statutes which bar the payment of statutory compensation for partial disability resulting from silicosis. See 3 Colo. Stats. Ann. §§450, 458-9 (1947 Cum. Supp.); Md. Code Ann. Art. 101, §14, 24 (Flack, 1947 Cum. Supp.); 4 Ann. Laws of Mass. c. 152, §§76-8 (1942, 1947 Cum. Supp.); Mich. Stats. Ann. §17.223 (1947 Cum. Supp.); N. J. Stats. Ann. §34:15-35.4 (1947 Cum. Supp.); N. M. Laws of 1945, c. 135, §4(a) and 10(a); 64 Consolidated Laws of N. Y. Ann. §§11 (McKinney, 1946), 39, 49-a (McKinney, 1948 Supp.); Ohio Gen. Code §1465-68a (Paige, 1946); 77 Penn. Stats. Ann. §1401(e) (Purden, 1947 Cum. Supp.); R. I. Gen. Laws of 1938, c. 300, as amended Laws of 1942, c. 1245, §3); The Workmen's Compensation Act of 1925, 15 & 16 Geo. 5, c. 84, para. 47.

---

[15] Utah Code Ann. §§ 42-1a-12(a), 42-1a-13, 42-1a-28 (1943).

[16] Id. § 42-1a-49; see also §§ 42-1a-13(a)(2) and (3), 42-1a-13(b)(3) and (4).

[17] Id. § 42-1a-12. In addition, full compensation is payable for death from silicosis complicated by tuberculosis. Id. § 42-1a-30.

POOR COPY

BLEED THROUGH

So far as we have been able to ascertain, it is assumed that each of these statutes was intended to occupy the entire field of silicosis and to cut off any common law rights which there might have been to recover for partial disability. Two of the laws, those of New York and Pennsylvania, have been so construed by the courts of those states.[18]

The dates on which the statutes above were enacted show that it is only in comparatively recent years that the states have tackled the grave personal, social and economic problem presented by industrial diseases. In shaping its initial experiment in the field, Utah deemed it wise to bar compensation for partial disability. Whatever the reasons were—perhaps a desire to make a cautious start, perhaps the difficulty of diagnosing accurately the preliminary stages of silicosis and the attendant risk of fraud, perhaps something else—the decision had the approval of labor members on the Utah committee and all members of the state legislature, and it accorded with the decisions reached by law-makers in many other jurisdictions.[19] Such a law can hardly be called arbitrary or capricious. And, as was said in *Olsen* v. *Nebraska*, 313 U. S. 236, 246 (1941), this Court is not properly concerned with "the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the constitution—to the States and to Congress.'" [Citing Mr. Justice Stone's dissent in *Ribnik* v. *McBride*, 277 U. S. 350, 375 (1928)].

---

[18] Del Busto v. DuPont de Nemours & Co., 167 Misc. 920, aff'd 259 App. Div. 1070, appeal denied 284 N. Y. 817, 29 N. E. 2d 975 (1940); Moffett v. Harbison-Walker Refractories Co., 339 Pa. 112, 14 A. 2d 111 (1940); cf. Scherini v. Titanium Alloy Co., 286 N. Y. 531, 37 N. E. 2d 237 (1941).

[19] New York has recognized the complexity, as well as the importance, of the partial disability problem by recently enacting a law calling for the appointment of medical experts to investigate the "feasibility" of paying compensation for it. 64 Consol. Laws of N. Y. Ann. § 49-a (McKinney, 1948 Cum. Supp.).

(4) The petition should be denied in the exercise of this Court's discretionary power over rehearings.

Even if the Court should disagree with all the arguments heretofore set forth, the facts of this case make it appropriate that the petition be denied. From the appellant's standpoint, he has had the services of capable and respected counsel and ample opportunity to raise the federal questions at an earlier stage of the case. Being aware of the jurisdictional defect in his appeal as early as the time he petitioned the Utah Supreme Court for a rehearing, there was likewise no occasion to wait over four months after the denial of that petition before obtaining the certificate. From the Court's standpoint, there is no doubt but what the November 15 order dismissing the appeal was correct when entered; there could be no question of an abdication of jurisdiction if this rehearing were denied and the decision of a constitutional question touching state power thus avoided. The grant of a rehearing on the basis of the tardy certificate here involved would also condone a practice which is hardly conducive to the orderly dispatch of the Court's business. Should the rehearing be granted, moveover, the Court would be without the benefit of the discussion it might otherwise expect from the court having most intimate knowledge of the statute, the Supreme Court of Utah.[20]

---

[20] Utah Const. Art. VIII, § 25 requires that the reasons for any judgment of the Supreme Court of Utah be stated in writing. Thus, if the federal questions should be urged in a later suit, the presumption is that they would be dealt with in an opinion.

POOR COPY
BLEED THROUGH

Conclusion.

The petition for rehearing should be denied.

Respectfully submitted,

C. W. Wilkins,
Paul H. Ray,
Charles A. Horsky,
Attorneys for Appellees.

Cheney, Marr, Wilkins & Cannon,
Covington, Burling, Rublee, Acheson & Shorb,
Of Counsel.